Nos. 78-658 and 678

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-678

COLORADO RIVER WATER CONSERVATION DISTRICT; SOUTHWESTERN WATER CONSERVATION DISTRICT; NORTHERN COLORADO WATER CONSERVANCY DISTRICT; CITY OF COLORADO SPRINGS; CITY OF AURORA; BOARD OF WATER WORKS, CITY OF PUEBLO; AND THE CITY AND COUNTY OF DENVER, *Petitioners*

v.

ENVIRONMENTAL DEFENSE FUND., INC., *et al.*, *Respondents*

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UTAH POWER AND LIGHT CO., *Petitioner*

v.

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY MEMORANDUM OF PETITIONERS COLORADO RIVER WATER CONSERVATION DISTRICT ET AL., TO THE BRIEFS IN OPPOSITION

[List of Counsel Inside Cover]

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The government's brief chooses to meet the Circuit's view that the petitioners be remitted to the "political processes" of the sovereign states in the defense of their interests rather than the federal courts by ignoring it. EDF relegates this proposition to a footnote (EDF Br. p. 20, n. 35) where it would have this Court believe that by its reference to the "internal mechanisms" and "political processes" of the sovereign states, the court below meant rulemaking on both the federal and state level. This incredulous suggestion of the "very significant point" the court was making obviously overreaches in an effort to mask the rather plain meaning that if the entities of the state having rights to protect do not appreciate the conduct of that defense that they seek a change in leadership at the state capital. This notion is not only inappropriate in the defense of a lawsuit but is of course unrealistic. The "political processes" require time far beyond the inexorable process of trial court proceedings. Neither ignoring this view, as the Government would do, nor explaining it away by fantasy, as EDF would do, faces up to the evident reality behind this view to begin with, namely that if "internal mechanisms" and "political processes" need to be invoked at all it is quite apparent that there may be inadequacy of representation of rights under attack in court. That is what this case is all about, and in those circumstances, this Court's holding in *Trbovich* v. *United Mine Workers,* 404 U.S. 528, 538 n. 10, should apply.

Several additional points should be made with regard to the briefs in opposition. Among them, the government and EDF misunderstand our argument when they suggest our contention is that the doctrine of *parens patriae* only applies in the original jurisdiction context (U.S. Br. p. 5, EDF Br. p. 15). Undeniably, the doctrine itself has broader application. *See Hawaii*

v. *Standard Oil,* 405 U.S. 251 (1972). The opinion below, however, was bottomed on the standards adopted by this Court in *New Jersey* v. *New York,* 345 U.S. 369 (1963), applying *parens patriae* to an intervention in an action involving "controversies between the states". We assert that it was not intended that those standards be extended to a lawsuit in district court where the appropriate limitations of the Supreme Court's rules on original jurisdiction were not intended to apply.

EDF and the federal respondents also suggest that the appropriate standard for intervention here is "compelling showing" or "special interest" without reconciling these standards with the "minimal burden" standard established by this Court in *Trbovich* (U.S. Br. p. 5, EDF Br. p. 20). Their reliance on *Pennsylvania* v. *Rizzo,* 530 F.2d 501 (3rd Cir.), *cert. denied sub nom., Fire Officers Union* v. *Pennsylvania,* 426 U.S. 921 (1976), is misplaced. The Third Circuit clearly stated that "the ultimate issue in this appeal is the timeliness of the intervention motion." *Id.* at 504. The precise holding therefore, was not on the issue of adequacy of representation, but on the timeliness of the motion to intervene, which the court held to be inexcusably late. *Id.* at 501. The other case authority cited by EDF and the federal respondents falls far short of supporting what they perceive to be a "rule" in lower federal courts.[1] To the contrary, the well-reasoned an-

[1] EDF cites *United States* v. *Nevada,* 412 U.S. 534 (1973) and *United States* v. *Crookshanks,* 411 F.Supp. 268 (D. Oregon 1977), both clearly distinguishable—*Nevada* involving the state's capacity to represent all her citizens in an interstate compact and *Crookshanks* involving the scope of a TRO as including fishermen of a state when that state was a party to the action—neither involves intervention. The two intervention cases cited are not controlling. *Stream Pollution Control Board* v. *United States Steel, Inc.,* 62

alyses in cases such as *United States* v. *Reserve Mining*, 56 F.R.D. 419-20 (D. Minn. 1972), *aff'd on other grounds*, 498 F.2d 1073 (8th Cir. 1973), and *General Motors* v. *Burns*, 50 F.R.D. 401, 404-06, (D. Hawaii 1970), make clear that *parens patriae* should not be invoked to preclude intervention by a party whose interests may be affected even though a governmental entity is already a party. This ruling has had wide application. *See, e.g., National Farm Lines* v. *ICC*, 564 F.2d 381 (10th Cir. 1977) (common carrier associations not adequately represented by federal govern-

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F.R.D. 31 (N.D. Ind. 1974), was decided on the ground that the applicant for intervention did not sufficiently allege an interest in the action. In *Illinois* v. *Bristol-Myers Co.*, 470 F.2d 1278 (D.C. Cir. 1972), the state declared itself to be acting as a representative of a class including its political subdivisions pursuant to F.R. of Civ. Proc. 23. Here the State of Colorado supports the intervention of petitioners and the action is not a class action. Furthermore, the court below acknowledged that the petitioners have an interest in the subject matter of the proceedings.

The government's case authority is also wide of the mark. *United States* v. *Associated Milk Producers, Inc.*, 534 F.2d 113 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976) held a farmers' organization would not be permitted to intervene where it had already submitted voluminous information on a proposed settlement in antitrust litigation. That case is part of the specialized body of case law on antitrust consent decrees as is *Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961), where this Court specifically declined to "assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree." *Id.* at 689. Reliance on *Leech Lake Area Citizens Committee* v. *Leech Lake Band of Chippewa Indians*, 486 F.2d 888 (9th Cir. 1973), is also misplaced. There denial of previous efforts at intervention had become final and the court viewed the appeal of the latest attempt as frivolous. *Associated Industries* v. *Train*, 543 F.2d 1159 (1976), holding the State of Alabama was adequately represented by the federal government is limited to the peculiar facts of that case wherein Alabama failed to file a pleading setting forth its claims or defenses. *Id.* at 1161 n. 8.

ment); *New York P.I.R.G.* v. *Regents*, 516 F.2d 350 (2nd Cir. 1975) (pharmaceutical association not adequately represented by state agency); *Sierra Club* v. *Stamm*, 6 E.R.C. 1848 (D. Utah 1974), *aff'd on other grounds*, 507 F.2d 788 (10th Cir. 1974) (State of Utah and four water districts permitted to intervene in a suit threatening their beneficial use of water); *Sierra Club* v. *Froehlke*, 359 F.Supp. 1289 (S.D. Texas 1973) (agency of state and several municipalities of state granted intervention as of right); *Holmes* v. *Gov't of Virgin Islands*, 61 F.R.D. 3 (D. Virgin Is. 1973) (corporation not adequately represented by government of Virgin Islands); *Keith* v. *Volpe*, 352 F.Supp. 1324 (C.D. Cal. 1972), *aff'd on other grounds sub. nom Keith* v. *California Highway Commission*, 506 F.2d 696 (9th Cir. 1974) (municipalities granted intervention as of right where state agencies were already parties).

EDF also contends that a finding of adversity of interest is required before inadequate representation can be found (EDF Br. p.20). This is not the rule and the cases EDF cites do not suggest it is. EDF attempts to derive a negative inference from *New Mexico* v. *Aamodt*, 537 F.2d 1102 (10th Cir. 1976), *Peterson* v. *United States*, 41 F.R.D. 131 (D. Minn. 1966), and *Stadin* v. *Union Electric*, 309 F.2d (9th Cir. 1962). Because the courts in these cases found representation inadequate due to the adversity of interests between the intervenors and their proposed "representatives", EDF concludes that adversity of interest is required. This is pure fallacy. Wright & Miller, *Federal Practice and Procedure*, § 1909 at 523-24 (1972). See *Ford Motor Co.* v. *Bisanz Bros., Inc.*, 249 F.2d 22 (8th Cir. 1951).

Moreover, EDF's reliance (EDF Br. p. 20) on *Nuesse* v. *Camp,* 385 F.2d 694 (D.C.Cir. 1967), on this issue is particularly surprising since *Nuesse* specifically stated that "little guidance" could be obtained by reference to *Stadin, supra. Nuesse* v. *Camp,* 385 F.2d at 702-03. The court in *Nuesse* pointed out that the change wrought by the 1966 amendments to Rule 24 "underscores both the burden on those opposing intervention to show the adequacy of existing representation and the need for a liberal application in favor of intervention." *Id.* at 702. On the issue for which EDF cites *Nuesse,* the court ruled that "interests need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate." *Id.* at 703.

The government's brief at last appears to acknowledge that this lawsuit may be expected to spread well beyond the simple question of whether EPA's approval of the state salinity control standards was unlawful under the Federal Water Pollution Control Act Amendments of 1972. In noting that this is "primarily" the issue "at least at present" the government very properly qualifies the situation to sketch some of the factual problems and issues which are involved, the impact of which on the water supply responsibilities of the Districts and Cities, apart from the general responsibilities of the State, are plainly evident.[2] Yet it

[2] See U.S. Br. p. 7, n. 5. This cautious characterization by the government is certainly required as a consequence of an order of September 1, 1978 in the district court denying all of the U.S. and state motions for judgment on the pleadings, directed at these very issues. The court indicated that some of the determinations to be made "will require the court to immerse itself in a great deal of highly technical data" and that the "appropriate evidentiary review is broad" even though grounds on which a court may reverse EPA are quite narrow (Order, p. 4).

was the simple question of federal law approach which both EDF and the government urged as making the participation of the Districts and Cities unnecessary because their interests were alleged to be identical with the States. This simplistic yet erroneous view prevailed below, with *parens patriae* as protective cover (Pet. App. 3a, 14a-16a). It is at least clear from the government's brief, contrary to EDF's insistence that state representation is adequate, that large matters having impact on local entities are at stake in which local views may well be different and which they, not the state, should be expected and entitled to protect.

Finally, the continuing harm of the result below is amply demonstated by the district court's memorandum and order of November 3, 1978 in *Environmental Defense Fund, Trout Unlimited and the Wilderness Society* v. *Higginson, Com'r., U.S. Bureau of Reclamation, et al,* D.D.C. Civil Action No. 78-1135 (Appendix A hereto), which among other things denied intervention to several Colorado water districts, including two of the petitioners here, in a suit aimed at stopping immediately construction on nine federally authorized water projects in the Colorado River Basin located in Arizona, Colorado, Nevada, Utah and Wyoming. This denial of intervention to clearly impacted local entities, coming hard on the heels of the action below and relying on it, indicates the urgency of action now by this Court. There should be no doubt as to entitlement to full participation in court, not only by states but by affected entities within them, in the face of efforts, here in a court far removed from the place of use, to stop the further development of an essential natural resource.

It is respectfully urged that the decision of the court of appeals denying petitioners' motion to intervene be reviewed and reversed.

Respectfully submitted,

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Dated December 28, 1978

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1135

ENVIRONMENTAL DEFENSE FUND INC., ET AL., *Plaintiffs*,

v.

R. KEITH HIGGINSON, Commissioner, Bureau of Reclamation, Department of Interior, ET AL., *Defendants*.

Memorandum and Order

(filed November 3, 1978)

This matter comes before the court on motions to intervene filed by four states and several local entities. In this suit, the plaintiffs seek declaratory, injunctive, and mandatory relief pursuent to Section 102(c) of the National Environmental Policy Act ("NEPA") of 1969, 42 U.S.C. §§ 4321 *et seq.* The plaintiffs ask this court to order the federal defendants to prepare a comprehensive environmental impact statement ("EIS") analyzing existing and future water resource projects and operations in the Colorado River Basin ("Basin"). As part of their prayer for relief, the plaintiffs seek to enjoin the construction of nine planned federal water resource projects in the Basin pending completion of the comprehensive EIS.

Each of the movants seeks intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure or, in the alternative, permissive intervention under Rule 24(b). The first group of intervenors comprises four of the seven Basin states affected by the federal program of water resource development projects: Arizona, Colorado, Nevada, and Wyoming. The second group comprises four local Colo-

rado water districts, one local Nevada water district, and one electrical utility company. The plaintiffs do not oppose intervention by the states, although they suggest that it would be appropriate for the court to impose conditions on the participation of those states admitted as parties to this litigation. Intervention by the second group of entities, whether of right or permissive, is opposed by the plaintiffs. The federal defendants apparently do not oppose the intervention of either group of movants.

The four states of Arizona, Colorado, Nevada and Wyoming are entitled as of right to intervene in this action. The plaintiffs raise the concern, however, that, as parties, those states might adopt dilatory measures that could impede the prompt resolution of this suit. But, at this point in the litigation the plaintiffs' fears of duplicative discovery and dilatory motion practice are too conjectural to warrant the imposition of conditions upon the intervenors. If future actions by the intervening parties threaten to jeopardize the efficient conduct of the proceedings, the court will consider imposing appropriate conditions upon those parties.

The court will deny the motions filed by the Nevada entity and the Colorado entities to intervene as of right in this suit. As in *EDF* v. *Costle,* Civil Action No. 77-1436 (Mem. Op. April 20, 1978), *sum. aff'd* Appeals Nos. 78-1471, 78-1515, and 78-1566 (D.C. Cir. 1978), the intervening states of Colorado and Nevada will be able to speak for and represent the interests of the local groups who seek to become parties to this litigation. The fact that the interests of these groups may diverge from those of the federal defendants does not make out a case of inadequate representation under Rule 24(a)(2), because the court has ruled that Colorado and Nevada are entitled to intervene. None of the local Colorado water districts or the local Nevada water district has offered any compelling reason or circumstance, *see State of New Jersey* v. *State of New York,* 345 U.S. 369 (1953), in which they differ materially with

the positions taken by those intervenors. Therefore, under the doctrine of *parens patriae* the interests of these five entities are adequately represented in the present suit.

The *parens patriae* doctrine does not apply to the Utah Power and Light Company, a utility company which supplies a large portion of the total electricity needs of Utah and Wyoming, because it is not a citizen of any state that has moved to intervene in this suit. The company, therefore, is entitled to intervene as of right.

The court in its discretion will deny the motion for permissive intervention under Rule 24(b) filed by the local Nevada water district and the local Colorado water districts. A review of the arguments the local groups propose to advance if they are admitted to this action indicates that they either are cumulative or would be unlikely to help this court resolve the question of the government's compliance with NEPA.

Therefore, upon consideration of the motions to intervene, and the opposition thereto, it is, by the court, this 3rd day of November, 1978.

ORDERED that the motions of Arizona, Colorado, Nevada, Wyoming, and the Utah Power and Light Company to intervene as of right are granted; and it is further

ORDERED that the motions of the Colorado River Water Conservation District, Southwestern Water Conservation District, Dolores Water Conservancy District, Tri-County Water Conservancy District, and Las Vegas Valley Water District to intervene as of right or, in the alternative, for permissive intervention are denied.

/s/ THOMAS A. FLANNERY

United States District Judge